

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRENCE OSCAR POSEY, a/k/a TERRANCE  
OSCAR POSEY,

Defendant-Appellant.

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UNPUBLISHED

August 17, 2006

No. 259820

Kent Circuit Court

LC No. 03-009419-FH

Before: Zahra, P.J., and Neff and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of receiving racketeering proceeds from a criminal enterprise, MCL 750.159i(3). He appeals his conviction as of right. We affirm.

Defendant ran an online escort service called tpoze.com (Tpoze). Tpoze advertised that each “model” would offer an hour of topless massage, exotic dancing, or role playing for a \$150 “appearance fee.” Clients could request additional services for a “tip.” During the life of the business, several models performed various sexual acts for tips. Defendant typically received the entire value of the appearance fee that the model earned on an appointment. He also took the tips earned by some models who lived with him, including tips earned for performing sexual services. Several models testified that defendant encouraged them to perform sexual acts.

Defendant was charged with one count of conducting a criminal enterprise, MCL 750.159i(1), one count of acquiring or maintaining a criminal enterprise, MCL 750.159i(2), one count of receiving racketeering proceeds from a criminal enterprise, MCL 750.159i(3), one count of conspiracy to commit racketeering, MCL 750.159i(4), and one count of accepting the earnings of a prostitute, MCL 750.457. He was only convicted of receiving racketeering proceeds from a criminal enterprise.

Defendant first argues the prosecutor violated his Fifth Amendment right to remain silent by a comment made in rebuttal to defense counsel’s closing argument. “The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial (i.e., whether prejudice resulted).” *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). The reviewing court must examine the prosecutor’s remarks in context on a case-by-case basis. *Id.* at 272-273. We review constitutional questions and prosecutorial misconduct allegations de novo. *Id.* at 272. The Michigan and United States Constitutions guarantee a defendant the right against compelled

self-incrimination. *People v Fields*, 450 Mich 94, 108-109; 538 NW2d 356 (1995); US Const, Am V; Const 1963, art 1, §§ 15, 17. To effectuate this right, no reference may be made to a defendant's failure to testify. *Fields, supra* at 108-109. Here, the prosecutor did not comment on defendant's failure to take the stand. Instead, in response to defense counsel's attack in closing argument on a witness' credibility, the prosecutor stated that defendant chose not to put on any evidence in this case and, as a result, the witness' testimony was uncontradicted. A prosecutor's statement – that evidence is undisputed – is not a comment regarding the defendant's failure to testify, especially when someone other than the defendant could have testified. *People v Perry*, 218 Mich App 520, 538; 554 NW2d 362 (1996).

Defendant failed to present any testimony from witnesses who worked for him to contradict the statements of the prosecution's witness. A prosecutor may attack the credibility of a theory advanced by a defendant at trial by pointing to the lack of evidence supporting the theory. *People v Callon*, 256 Mich App 312, 331; 662 NW2d 501 (2003). A prosecutor's argument is proper unless it burdens the defendant's right not to testify or allocates some burden to defendant to disprove an element of the offense. *Fields, supra* at 112-113. Because the prosecutor specifically stated defendant did not have to call witnesses or present a case, and the court specifically instructed the jury that defendant had no obligation to offer evidence, we find the prosecutor's argument did not shift any burden. Therefore, the prosecutor's remark was permissible, and defendant was not denied a fair trial.

Second, defendant argues the trial court impermissibly allowed prior acts evidence in violation of MRE 404(b)(1). Because defendant did not challenge the evidence on the basis of MRE 404(b), this issue is unpreserved. An objection on one ground is insufficient to preserve an objection on another ground. MRE 103(a)(1). We review unpreserved evidentiary errors for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). We have reviewed defendant's evidentiary challenges and find no plain error based on MRE 404(b). As will be discussed, none of the challenged testimony was offered or admitted to show defendant's criminal propensity or to establish actions in conformity therewith. Therefore, it did not violate MRE 404(b), *People v Katt*, 248 Mich App 282, 304-305; 639 NW2d 815 (2001).

Testimony from Jennifer Holcomb – regarding threats she received in jail on an unrelated charge from inmates acquainted with defendant – reflected on her credibility, and evidence that supports credibility is relevant. *People v Mills*, 450 Mich 61, 72; 537 NW2d 909 mod 450 Mich 1212 (1995). Furthermore, the trial court limited its prejudicial effect by instructing the jury pursuant to MRE 105.<sup>1</sup> A carefully constructed limiting instruction is sufficient to counterbalance any potential for prejudice created by other-acts evidence. *People v Martzke*, 251 Mich App 282, 295; 651 NW2d 490 (2002). Jurors are presumed to follow instructions, *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), and instructions are presumed to cure most errors, *Abraham, supra* at 279.

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<sup>1</sup> MRE 105 states, "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly."

Testimony that defendant used drugs and threw wild parties at his home was relevant to rebut defendant's statement to police that drug activity did not occur. Accordingly, defendant's credibility was a material issue, and evidence regarding the credibility of his statements was relevant. *Mills, supra* at 72. Questions regarding witness credibility must be resolved by the trier of fact. *People v Williams*, 268 Mich App 416, 418; 707 NW2d 624 (2005). Additionally, the trial court provided a proper limiting instruction pursuant to MRE 105, reminding the jury to only consider this testimony to determine defendant's credibility.

Testimony from another witness that she and defendant used cocaine together, and that she saw defendant hold a knife to her friend's throat was improper. However, the trial court instructed the jury that this was not a drug case, and the jury should not be distracted by the statement about cocaine. The court also instructed the jury to disregard the testimony regarding defendant's threats and violent behavior; hence, the evidence was not admitted. Because we presume that the jurors followed these instructions, we conclude that the trial court did not commit plain error affecting defendant's substantial rights. *Graves, supra*; *Carines, supra*.

Defendant next argues the trial court erred by admitting emails sent to Tpoze; he claims the emails were improper hearsay. We review the trial court's decision to admit evidence for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). An abuse of discretion occurs when a court admits evidence that is inadmissible as a matter of law. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). Because the question whether MRE 801(c) precluded admission of the emails is one of law, it is reviewed de novo. *Id.* "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c).

A statement offered to show its effect on the hearer is not hearsay and, therefore, may be properly admitted into evidence. *People v Lee*, 391 Mich 618, 642; 218 NW2d 655 (1974), citing McCormick, Evidence, § 228, pp 464-465. The prosecution did not introduce the emails to prove that clients and models engaged in various sexual activities. Instead, the trial court admitted the emails to aid the jury in determining whether defendant knew, or should have been aware, of the likelihood that his models performed sexual acts for money. The trial court instructed the jury to consider the challenged emails only for this purpose. Because the emails were admitted to show defendant's potential knowledge, they were admitted to show their effect on defendant, and defendant's hearsay objection has no merit.

Defendant additionally argues the admission of the emails violated his Sixth Amendment right to confrontation because he was unable to cross-examine the authors of the emails. Defendant's objection at trial on hearsay grounds was insufficient to preserve an appellate attack premised on a confrontation clause violation, and this argument is unpreserved; accordingly, we review for plain error affecting defendant's substantial rights. *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003). In *Crawford v Washington*, 541 US 36, 59; 124 S Ct 1354; 158 L Ed 2d 177 (2004), the United States Supreme Court held, "[t]estimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." However, "the [*Crawford*] Court also made clear that the Confrontation 'Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.'" *People v McPherson*, 263 Mich App 124, 133; 687 NW2d 370 (2004), quoting *Crawford, supra* at 59 n 9. Consequently, the trial court did not violate defendant's right of confrontation.

Next, defendant claims there was insufficient evidence that he received racketeering proceeds from a criminal enterprise because he was acquitted of accepting the earnings of a prostitute, the underlying racketeering offense. We disagree. A claim of insufficient evidence is reviewed de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). The evidence is viewed in a light most favorable to the prosecution to determine if a rational trier of fact could find beyond a reasonable doubt that the essential elements of the crime were established. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005). MCL 750.159i(3) provides in relevant part that a person who has knowingly received proceeds derived from a pattern of racketeering activity shall not invest the proceeds in the operation of an enterprise. MCL 750.159g(ee) defines racketeering as “committing, attempting to commit, conspiring to commit, or aiding or abetting, soliciting, coercing, or intimidating a person to commit an offense for financial gain, involving [a violation of MCL 750.457].” MCL 750.457 defines the criminal liability imposed for accepting the earnings of a prostitute.

The evidence supported that Tpoze models performed sexual acts for “tips,” that clients contacted Tpoze directly to set up appointments to receive sexual services, that defendant was aware clients wanted the models to perform sexual acts when he set appointments, that defendant expected models to perform these services, and that defendant took the money the models earned from these appointments including tip money from some models. Hence, the prosecution presented sufficient evidence to establish that defendant knowingly accepted the earnings of a prostitute. Further, the numerous incidents had substantially similar purposes, results, and participants, and were not isolated. They posed a threat of continued criminal activity, specifically, providing sexual acts for money, and all occurred within the relevant time frame. Thus, the prosecution presented sufficient evidence to enable the jury to find beyond a reasonable doubt that defendant engaged in a pattern of racketeering activity, and knowingly received proceeds derived directly or indirectly from that pattern of activity. MCL 750.159i(3). Our Supreme Court has consistently upheld inconsistent jury verdicts on multiple-count indictments. See, e.g., *People v Lewis*, 415 Mich 443, 454-455; 330 NW2d 16 (1982) (upholding a jury verdict convicting the defendant of felony-firearm but acquitting him of the underlying felony). “A jury in a criminal case may reach *different* conclusions concerning an *identical* element of two different offenses.” *People v Goss (After Remand)*, 446 Mich 587, 597; 521 NW2d 312 (1994).

We recognize that inconsistent verdicts might require a mistrial when it is evident that the jury was confused, did not understand the instructions, or did not know what it was doing. *Lewis, supra.* at 450 n 9. Alternatively, the declaration of a mistrial is appropriate if some jurors agreed to compromise and convict a defendant on a particular charge although they did not believe beyond a reasonable doubt that the defendant committed the particular offense. *Id.* at 451-452. However, a defendant must offer evidence other than an inconsistent verdict to establish that the jury was confused, misunderstood the instructions, or improperly compromised to convict. *People v McKinley*, 168 Mich App 496, 510-511; 425 NW2d 460 (1988). Here, defendant fails to offer any evidence to establish the necessary grounds.<sup>2</sup>

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<sup>2</sup> Defendant also argues the trial court erroneously denied his motion for judgment of acquittal. Because the prosecution submitted sufficient evidence to permit the jury to conclude beyond a  
(continued...)

Finally, defendant argues the prosecution violated his Fifth Amendment right to be free from double jeopardy because it improperly divided defendant's original charge of accepting the earnings of a prostitute into a multiple-count indictment.<sup>3</sup> Whether defendant's double jeopardy rights were violated is unpreserved and, thus, is reviewed for plain error affecting defendant's substantial rights. *Carines, supra*. Defendant fails to provide evidence to support his claim that the prosecutor "turn[ed] one offense into a number of related complaints." It is not this Court's responsibility to search for a factual basis to sustain or reject defendant's position. *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001). Regardless, defendant's claim has no merit. The remedy for multiple punishment for a single offense is to vacate the lesser charge. *People v Herron*, 464 Mich 593, 609; 628 NW2d 528 (2001). Because defendant has only been convicted of one of the charged offenses, there is no error to rectify.

Affirmed.

/s/ Brian K. Zahra  
/s/ Janet T. Neff  
/s/ Donald S. Owens

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reasonable doubt that defendant knowingly received proceeds derived from a pattern of racketeering activity, the trial court did not err when it denied defendant's motion for judgment of acquittal. *People v Lemmon*, 456 Mich 625, 633-634; 576 NW2d 129 (1998).

<sup>3</sup> Within the context of his argument, defendant argues that he was denied due process because a unanimity instruction was not given. He fails to explain why a unanimity instruction was necessary, and fails to cite authority supporting that this instruction was required. Hence, he has abandoned this issue. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).